

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	CG Docket No. 05-338
Rules and Regulations Implementing)	(CG Docket No. 02-278)
The Telephone Consumer Protection Act)	(FCC 05-206)
of 1991)	

**COMMENTS OF AMERICAN BUSINESS MEDIA
(January 11, 2006)**

Pursuant to the Notice published in the Federal Register on December 19, 2005, American Business Media hereby submits comments on the rules proposed to implement the Junk Fax Prevention Act of 2005,¹ which was enacted on July 9, 2005. That Act: (1) codified a regulatory but previously controversial “established business relationship” exception to the prohibition on sending unsolicited fax advertisements and (2) made clear that the prior “express invitation or permission” required to avoid the “unsolicited” classification could be “in writing or otherwise.” As requested in the Notice, American Business Media will endeavor to address the issues in the order in which they are presented there.

INTRODUCTION

American Business Media (ABM), which this year will celebrate its one hundredth birthday, is the industry association for business-to-business information providers. Its members produce magazines, trade shows, newsletters, data, web sites and other products that enhance their primary mission: to disseminate information that is vital to American industry and

¹ Pub. L. No. 109-21, 119 Stat. 359 (2005).

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professions. Its more than 280 members publish 2,000 periodicals, maintain 1,800 web sites and reach approximately ninety million professionals in 181 industries and professions. American Business Media's members range in size from small, family-owned companies publishing one or two low-circulation periodicals to international entities with a large and diversified portfolio of business-to-business media.

Despite their differences, ABM members to a great extent share reliance on targeted fax communications with subscribers, trade show attendees and participants, advertisers and others with whom they do business. In light of its members' reliance upon lawful, targeted faxes, American Business Media has also participated actively in previous rulemaking proceedings involving faxes.²

ABM members' reliance on legitimate, targeted fax communications also led them to support the Junk Fax Prevention Act of 2005 ("JFPA"), which amended the Telephone Consumer Protection Act (47 U.S.C. §227) in two primary ways. First, as highlighted above, the Act codified this Commission's 1992 determination that commercial faxes may be sent where there is an established business relationship (EBR) and without additional indicia of consent.³ In so doing, it rendered moot the Commission's later action in Docket No. CG 02-278, where the

² ABM filed Comments on November 11, 2002, a Request for Stay on August 6, 2003 and a Request for Reconsideration and Clarification on November 25, 2003, all in CG Docket No. 02-278. The Request for Reconsideration and Clarification remains pending. Although the Notice states (70 Fed. Reg. at 75108) that it will consider filings from that docket in this one, American Business Media specifically adopts and incorporates by reference its Request for Reconsideration and Clarification.

³ That ruling had been challenged in various state courts, some of which found that it was unenforceable as beyond the scope of the Commission's statutory authority.

Commission reversed field and adopted, but later stayed, a regulation that would have deemed commercial faxes to be “unsolicited” even where an established business relationship exists.

Second, the JFPA added the words “in writing or otherwise” at the end of the definition of “unsolicited advertisement.” This second change clarifies that “express invitation or permission,” which removes an advertising fax from the definition of an “unsolicited fax,” need not be in writing. This change appears to have been made in response to and to negate the Commission’s announced but stayed regulation requiring that the “invitation or permission” be in writing and signed.

The JFPA is a welcome addition to the law, since it recognizes that, even in the Internet age, certain uses of facsimile machines continue to be the most efficient and effective ways for businesses to communicate with their customers. It balances the needs of businesses with the desires of recipients, and it generally strengthens the consumer protections in the Telephone Consumer Protection Act by, for the first time, requiring lawful commercial faxes to contain express provision for—and faxers to honor—requests by recipients to opt-out of future faxes.

American Business Media is well aware of the typically apocryphal stories of fax machines overflowing with incoming advertisements and rendered useless to their owners. Indeed, American Business Media and its members also receive unwanted faxes. But the Commission must keep in mind that its regulations and acts of Congress will never be effective in stopping the faxes that were illegal before the passage of the JFPA and continue to be illegal after its passage as long as senders are willing to violate the law. As long as the real culprits—the junk faxers who transmit seemingly limitless numbers of faxes indiscriminately and who create virtually all of the problems—violate the laws and regulations, any effort to rein them in

with increasingly restrictive regulations will do nothing to inhibit them but will deter the sending of legitimate, targeted faxes. Congress wisely recognized this difference, and we hope and expect that this Commission will as well.⁴ Only effective enforcement will eliminate the problem of unwanted faxes.

COMMENTS

In the comments that follow, American Business Media will address each of the substantive areas discussed in the Notice and for the convenience of the Commission will duplicate the captions in the Notice as subject headings.

Recognition of an Established Business Relationship Exemption

A preliminary note: although in this section of the Notice, beginning at p. 75104, the Commission recognizes the legal effect of the JFPA, American Business Media is concerned that here and elsewhere the Notice uses language that would suggest that conforming the regulations to the new law is optional. Thus, at page 75105 (col.⁵ 2), the notice states that “if” the Commission adopts language embodying the JFPA Act’s provisions concerning the timing of the

⁴ The Commission may well ask, as may other parties in their comments, why businesses should be so concerned about either obtaining prior consent or sending faxes even in its absence, if the recipient truly welcomes the fax. As to the former, obtaining advance consent, and doing so in a form that permits verification, can be a daunting and expensive task. Consider a very small publisher with two small, 60,000 circulation publications. Even assuming no change in its subscriber list, which would be a false assumption, it would be required to seek, obtain and store 120,000 consents in order to fax important subscription information to subscribers. As for sending welcome faxes without prior consent, unfortunately the growth of companies such as the FCC Enforcement Company, the Fax Law Center and Fax Recovery Systems, Inc., which solicit faxes from recipients, obtain irrevocable assignment of the right to sue and then send out threatening letters (and file suit), has created serious problems. American Business Media members have found that, frequently, an office employee is asked to gather all incoming advertising faxes and turn them over to the party seeking the assignments. Welcome faxes are swept up with the “junk” faxes, and by the time the target of the law suit can contact the fax recipient, it is too late. The EBR exception provides much-needed protection with little burden on recipients, as Congress so found.

⁵ “Col.” references are used herein to assist the reader in locating the cited text, with the columns on the Federal Register pages numbered 1, 2 and 3, from left to right.

establishment of an EBR and the obtaining of a fax number, it seeks comments on verification.

Similarly, at page 75109 (col. 3), the Notice contains the following language (emphasis added):

If the Commission adopts an EBR exception to the prohibition on sending unsolicited facsimile advertisements, many entities that send such messages only to their EBR customers will not be required to separate permission from recipients, thus potentially minimizing some of the compliance requirements.

American Business Media respectfully submits that these two sentences are inartfully drafted and that the Commission is without the discretion not to adopt the timing provisions and the EBR exception. We expect that the Commission agrees.

The Commission first seeks general comment on its regulatory change adopting section 2(a) of the JFPA (p. 75105, col. 2). As stated above, such changes are required. More specifically, the Commission asks whether it should “establish parameters” defining the circumstances under which a fax number is provided within the context of an EBR. American Business Media submits that any attempt to define such circumstances would invariably fall short of either covering all such circumstances or avoiding the same sort of ambiguity that will exist in the absence of such further definition.⁶

Nevertheless, the Commission can and should diminish the inherent ambiguity by identifying certain types of interaction that, if followed, will create a safe haven and immunity from charges that the fax number was not provided in the context of an EBR. It should do so with the express statement that the list is not exclusive and that other forms of interaction will

⁶ We urge the Commission to consider, throughout its deliberations, that legitimate businesses, unlike the junk faxers, work hard and take steps to avoid the lawsuit plague, so that they will err on the side of caution and certainty as they develop policies to conform their faxing to the law and regulations. This comment applies not only as to this issue but as to most, or all, of the others as well. The existence of the private right of action, and an active plaintiffs’ bar (see, for example, www.junkfaxes.org), has caused legitimate businesses to overcompensate.

have to be assessed on a case-by-case basis in the appropriate forum. The interactions that American Business Media suggests ought to be included in the safe harbor list, among others, are:

- a fax number provided voluntarily to, and on a form provided by, a business (for use by that business only, and not by a third party if the form is obtained by a third party); and
- a fax number provided on a business card or otherwise (such as orally or on letterhead) at the same time as a request for information, that is, an “inquiry,” is made.

The Commission next asks (p. 75105, col. 2) under what circumstances it should recognize that a person has voluntarily made his fax number available “for public distribution.” Once again, the Commission cannot so tightly define these terms as to resolve all ambiguity, but it can help. First, it can explain that there are certain situations that are easily defined. For example, a fax number in the Yellow Pages, or a fax number on a billboard or provided in any other medium (like newspapers or radio), ought to be fair game. On the other hand, fax numbers listed in, for example, association directories that are made available for use only by members of that association ought not be considered to have been provided by the facsimile machine owners for the purpose of making them publicly available.⁷

In response to the specific question whether a sender that obtains a fax number compiled in a directory, advertisement or web site should be required to make reasonable efforts to confirm with the entity that compiled the numbers that the future fax recipients intended that

⁷ It is a more difficult question whether such a directory properly may be used for purposes of obtaining fax numbers by other members of the association when those providing such numbers would expect those other members to have access to them. American Business Media suggests that the concept of “publicly” available can be applied to a group smaller than the public at large and that, in this situation, the number should be deemed to have been obtained lawfully and used lawfully, mindful of the fact that a fax would be legal only where there is also an EBR.

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the numbers be made publicly available, and assuming that this issue should be addressed at all in regulations (see below), American Business Media states that a sender should be required to seek to ascertain whether or not the fax number was intended by its owner to be made public, but that such effort need not be by contacting the compiler. It will often be obvious, or at least apparent, from the face of the source whether its contents were intended to be made public. Again, American Business Media is mindful, as should be the Commission, that a bad guess by a faxer is likely to lead to a lawsuit and, at worst, will cause the recipient to receive a single fax before opting out if additional faxes are unwanted. There are already in place substantial incentives for businesses to take steps to assure that their faxes are lawful.

Along these same lines, the Commission asks (p. 75105, col. 2) how it can verify that a sender had an EBR with a recipient and the recipient's fax number before July 9, 2005, which is the only way that a sender may lawfully use a fax number in its possession on that date without the need to demonstrate the source of the number. American Business Media's first response is that there is no need for the Commission to issue regulations covering how, if at all, a sender should or must be able to demonstrate its compliance with the law and regulations in the event that a private or governmental enforcement action is commenced. The forum in which the matter is heard will determine both the nature of the burden and whether it is met. Although the Commission can in appropriate circumstances prescribe certain types of written record keeping for prospective application, it should not now attempt to determine and define what types of records were necessary before July 9, 2005.

Therefore, American Business Media suggests that the Commission should not address this issue in its regulations. We do so with knowledge that, as a practical matter, the sender will

be required to provide proof that the EBR existed and that the number was possessed on that date with business or other records, if available, or with credible parole evidence in the absence of documentary evidence.

Definition of Established Business Relationship

The first issue presented under this heading (p. 75105, col. 3) relates to the Congressional grant of authority to the Commission to impose time limits on an EBR for purposes of implementing the EBR exemption. American Business Media was surprised to see this issue in the Notice, since the Commission has to our knowledge not even begun, much less completed, the four-step process that Congress declared the Commission “shall” complete before limiting that duration.⁸ Comments at this time, other than those (which have not been solicited) addressing the manner in which that four-step process should be conducted, would appear to be premature and directly contrary to Congressional intent and the Commission’s mandate.

Notwithstanding the prematurity of the questions raised in the Notice, American Business Media has the following comments. Surely at this time there is no reason to believe that a limitation on the duration of an EBR would serve any useful purpose. Unless and until the Commission determines that there are a substantial number of complaints of “EBR faxes” justified by EBRs that reasonably ought to be considered expired, there is no basis on which to conclude that there is a problem in need of a solution.

⁸ The process requires the Commission to (1) determine whether faxes in the context of an EBR have led to a significant number of complaints, (2) determine whether such complaints involved an EBR the duration of which was longer than the Commission believes matches the reasonable expectations of consumers, (3) evaluate the costs to senders of demonstrating the timing of an EBR and the benefits to recipients of limiting an EBR’s duration, and (4) determine whether, with respect to small businesses, the costs would be unduly burdensome.

Moreover, the difference between the “telephone EBR” and the “fax EBR” noted by the Commission (p. 75106, col. 1), that is, that the telemarketing restrictions apply only to residential phones but that the fax restrictions apply to business faxes as well, argues for restraint. For American Business Media members, at least, virtually all faxes are sent to business-owned facsimile machines, and we expect the same is true for many, if not most (but concededly not all), commercial faxers. By applying the telemarketing restrictions only to residential phones, Congress revealed a policy determination that expectations of privacy and of freedom from commercial messages are greater in residences than in businesses, or at least that only the former were in need of protection from telephonic intrusion. The Commission should honor that policy by permitting an EBR of unlimited duration, at least until—as Congress required—it has good reason to impose a time limit.⁹

Notice of Opt-Out Opportunity

The first call for comments under this heading (p. 75106, col. 3) seeks input on whether it is necessary for the Commission to set forth the circumstances under which an opt-out notice is, in the words of the statute, “clear and conspicuous.” American Business Media suggests that it might be easier for the Commission to address this issue from the other side. It would seem easier to define when a notice is not clear and conspicuous, such as when it is difficult to notice or read, because it lacks sufficient type size, contrast or separation from other material to be seen and read easily by the average reader. American Business Media submits that this type of

⁹ Should the Commission nevertheless implement a time limit in this docket, American Business Media urges it to define an EBR to span the duration of a relationship, and not just its commencement. In other words, a subscriber purchasing a two-year subscription to a periodical should be deemed to have an EBR with the publisher for those two years, so that any time limit would apply from the end of the subscription, not the beginning. Surely, the recipient of the publication believes that it has an ongoing relationship with the publisher.

admittedly subjective approach ought to suffice, at least unless and until the Commission is advised of notices that do not meet the standard. American Business Media doubts that this will be a significant issue.

Next (p. 75106, col. 3), the Commission solicits comments on the appropriate response to the Congressional direction that it determine the “shortest reasonable time” within which the sender of a commercial fax must comply with an opt-out request. The Commission’s analogy to the thirty-day time limit in the telemarketing context is sound and should be adopted. While very small businesses sending out individual faxes sporadically can no doubt comply in thirty seconds, not thirty days, more sophisticated senders, especially those that use outside vendors and have multiple divisions in multiple geographic locations, will need the full thirty days to circulate opted-out numbers and scrub their lists.

The Commission’s call for comments on the interplay between the “separate requirements” for “senders” to identify themselves on faxes and for the telephone number of the “sending machine of the business” (p. 75107, col. 1) points out the need to clarify the term “sender” as it applies to faxes. Indeed, the Commission runs into trouble (at p. 75107, cols. 2-3) due lack of clarity to that term. The TCPA does not define the term “sender.” Such a definition would help distinguish between the business on whose behalf the fax is sent and a vendor who does nothing more than to transmit a fax provided by a business to a list provided by that business.

The Commission has addressed this matter previously. In its July 3, 2003 Report and Order in CG Docket No. 02-278 (FCC03-153), ¶¶ 194-95, the Commission properly determined that “fax broadcasters” are exempt from liability for unlawful faxes in the absence of a “high

degree of involvement or actual notice of an illegal use” of faxes. It ruled that a fax broadcaster, defined as a person that sends faxes for another for a fee,¹⁰ is liable only if it provides the fax numbers, is aware of the illegality of the ads, or is otherwise highly involved, such as having produced, reviewed or assessed the content of an ad.

American Business Media urges the Commission to craft a regulation defining the “sender” of a fax and further suggests that the CAN-SPAM Act of 2003, Public Law 108-187, 108th Congress, may be used as a guide. There, Congress defined the “sender” of a commercial e-mail for purposes of assigning both responsibility and liability as “a person who initiates such a message *and* whose product, service or Internet web site is advertised or promoted by the message.” Section 3 (16)(A), emphasis added. In turn, the term “initiates” is defined as “to originate or transmit such a message or to procure the origination or transmission of such message, but shall not include actions that constitute routine conveyance of such message.” A “sender” must meet both parts of this two-part test.

American Business Media submits that application of these concepts to faxes makes just as much sense as their application to e-mails. They would place full responsibility on an advertiser who transmits a fax either by sending it himself or procuring that service from another. They would protect a business whose ad is faxed without that business’s knowledge, such as if someone faxes a page from a multi-party catalog without one party’s consent or even knowledge. And they would continue to protect fax broadcasters whose only participation is “routine” conveyance of the fax.

¹⁰ See 47 CFR § 64.1200 (f)(4).

After a discussion of the appropriate treatment of “small businesses,” an issue that American Business Media will leave to others (notwithstanding that many of its members would qualify as small businesses), the Commission solicits comments on the creation of one or more additional opt-out methods. Specifically (p. 75107, cols. 1-2), the Notice seeks comment on the statutory provision permitting the addition of a cost-free mechanism to the required telephone and facsimile numbers for opting out. American Business Media advises the Commission that the statute has created uncertainty, with some urging that either the fax or phone number must now be cost-free to the fax recipient, while others contend that part (II) of amended 47 U.S.C. §227 (b)(2)(D)(iv) and its requirement for a cost-free mechanism has not yet been triggered, since the Commission has not yet acted to identify a specific cost-free mechanism.

The new regulations should clear up this confusion. In response to the Commission’s question (p. 75107, col. 1) whether it “needs to enumerate specific cost-free mechanisms,” American Business Media would prefer to be in a position of arguing that it need not and that, therefore, no cost-free mechanism must be provided. But it appears from the JFPA that Congress intended that there be at least one such mechanism, and that it left it to the Commission to determine what it should be. American Business Media contends that the Commission should by regulation provide (as mandated by the statute) that there must be an opt-out phone number and an opt-out fax number, but that neither must be cost-free if the sender provides either an e-mail address or a web site for purposes of opting out. American Business Media recognizes that not every American has Internet access, but we submit that, unless future developments (which could trigger a regulatory change) prove otherwise, it would be fair to assume that virtually every

person and business with a facsimile machine has Internet access. In those rare (if any) cases in which they do not, a simple phone call or fax will serve as a very low-cost alternative.¹¹

Request to Opt Out of Future Unsolicited Advertisements

The Commission's first question (p. 75107, col. 1) is whether a do-not-fax request should terminate the EBR exemption with the sender, even if the recipient continues to do business with the sender. The answer must of course be "yes," since, otherwise, the recipient of a fax from a company with which the recipient chooses—or even must—continue to do business would have no way to stop unwanted faxes.

The next question (p. 75107, cols. 1-2) is noted above as being problematic insofar as it appears to use the term "sender" imprecisely and, therefore, asks the wrong question. The Notice states:

The Commission seeks comment on whether to specify that if the sender of the facsimile advertisement is a third-party agent or fax broadcaster that any do-not-fax request sent to that sender will extend to the underlying business on whose behalf the fax is transmitted.

American Business Media respectfully submits that the appropriate question is precisely the reverse. That is, if a recipient opts out of additional faxes from the underlying business, does the request extend to the third-party fax transmitter? As suggested above in our discussion of "sender," the answer to this question must be "no." Returning briefly to the question in the notice, American Business Media submits that if the underlying business is the "sender" by virtue of it being that business's advertisement and

¹¹ Keep in mind that the phone and fax numbers must be available twenty-four hours a day, seven days a week, which means that the one minute or less it would take to place a phone call or opt-out fax will be very inexpensive, if it costs at all during off-peak hours.

of the business having arranged for it to be sent, the opt-out will always apply to that business. Otherwise, it could continue to fax by changing fax transmitters.

On the other hand, to answer the question as we would pose it, the fax transmitter (or agent) should not be held to be covered by an opt-out to a particular advertisement, or else it would be disabled from sending faxes for another client to that recipient. It would be wrong to assume in this situation that merely because a recipient chooses not to receive any more faxes from company A that it also wishes to terminate faxes from company B. Indeed, all consumers welcome certain ads while wishing to avoid others. American Business Media suggests that adoption of an appropriate definition of “sender” will clarify and simplify these types of questions and lead to better compliance.

Next, the Notice seeks on comment on whether the Commission should prescribe additional methods of opting out, besides the domestic phone and fax number and a cost-free mechanism (p. 75107, col. 3). American Business Media does not support development of a long list of opt-out methods, because the more that there are, the more difficult it will be for multi-office organizations to collate their lists and comply with the law. The goal, after all, should be to eliminate unwanted faxes, not to increase the number of lawsuits over such faxes. If the Commission adds web site/e-mail options to the phone and fax number, that should suffice. As to whether senders should be required to honor opt outs transmitted by methods other than those required by law or approved by the Commission (p. 75107, col. 3), the answer must be “no” if compliance is to be obtained. Businesses cannot be expected to comply with opt-out requests thrown over

the transom, or received in any of its numerous offices by mail, if they have not established a method for doing so.¹²

Authority to Establish Nonprofit exemption

The Notice asks (p. 75107, col. 3, to p. 75108, col. 1) whether the Commission should exercise its authority to exempt tax-exempt, nonprofit organizations from the opt-out notice requirement with respect to those organizations' faxes to members in furtherance of the organizations' tax exempt purposes. It should. Association memberships are different from traditional EBR relationships, because the latter may involve previous but not present customers, while the former signify presently-effective, ongoing relationships. Membership associations simply will not run the risk of offending, and thereby losing, members if they send unwanted faxes. The exemption would not apply to the sending of faxes to former members, as the general EBR exception applies to former customers.¹³

The Commission asks how members of associations can obtain the information necessary to communicate that they do not wish to receive faxes if they are not provided with opt-out information in the fax itself (p. 75108, col. 1). American Business Media submits that members of associations must know how to contact associations of which

¹² For example, even if mail is approved (and we do not think that it should be), a business would then provide a specific address or post office box to which the notice must be sent. If recipients are free to mail it to any company office or agent, it will be impossible to achieve compliance. The same problem would arise if a recipient wishing to opt out called a business phone number other than the number specified on the fax.

¹³ In fact, it is frequently impossible to differentiate between a "present" customer and a "former" customer. A consumer in the middle of a one-year contract for weekly trash pickup service is a present customer, but is the consumer who leased three automobiles from a single dealership over the past nine years a "customer" now? This ambiguity does not arise in the case of associations. Someone is either a member, or she isn't.

they are members. In fact, it is inconceivable that association would communicate with members and not provide contact information, especially if the fax in question is advertising a product or service offered by the organization.

The next related question (p. 75108, col. 1) asks how nonprofit associations will benefit from an exemption from the opt-out notice. American Business Media perceives that benefit as somewhat speculative. It is our experience and expectation that members of organizations support those associations' endeavors and in most cases do not mind, or actually prefer, to receive information from those associations by fax. And if fax communication is deemed by the association to be its most effective, least costly, or both, means of communicating even "commercial" messages to members, it makes sense not to place unreasonable roadblocks in the path of its continuing to do so. It is American Business Media's concern that many companies will begin a program of assigning lower-level employees the responsibility of following the opt out instructions on all incoming fax ads, and that association faxes will be swept into the same receptacle. Exempting association faxes from the notice requirement will tend to render opting out more of a conscious effort.

The final question under this heading (p. 75108, col. 1) asks how the FCC should determine when an ad is sent "in furtherance of the association's tax exempt purpose." American Business Media suggests that the Commission use as a guide the Internal Revenue Service's rules imposing taxes on nonprofit entities on income unrelated to the tax exempt purpose.

Unsolicited Advertisement

Responding to the JFPA's addition of the words "in writing or otherwise" to the definition of "unsolicited advertising," the Commission solicits comments on what other forms of permission should be permitted in the rules (p. 75108, col. 1). As American Business Media stated above with respect to the issue of how a fax sender may demonstrate when it obtained a fax number (in order to apply the JFPA's grandfathering provision), it is not necessary that it do so by rule, since the possibilities cannot be predicted and codified. Those against whom an action is commenced will have the burden of demonstrating the existence of "invitation or permission."

Nevertheless, it would be useful and might tend to diminish groundless lawsuits that are nothing more than extortion wrapped in legal jargon if the Commission addressed this issue without, necessarily, developing a comprehensive list of acceptable forms of invitation or permission.

As we did in our August 25, 2003 Request for Reconsideration and Clarification, we ask the Commission to consider that the TCPA uses the phrase "express invitation or permission," and that each of these words must be given meaning. In a business context, when a person directly and voluntarily provides his fax number to a business, it is fair to conclude that he is inviting that business to use it and that he expects it will be used for a business purpose. Thus, the "express" providing of a fax number (as opposed to having it appear on letterhead or in a directory) represents express invitation to fax promotional material.

American Business Media submits that the Commission's failure, thus far, to recognize, much less to address the significance of, the conjunctive in the TCPA's prohibition ("express invitation or permission") is a basic error that has affected each of its pronouncements in this and related dockets. Thus, the Commission's discussion of faxes in its July 3, 2003, Report and Order in CG Docket No. 02-278, began (¶¶ 185, 187 and 188) by quoting accurately the entire statutory phrase "express invitation or permission" in describing the restriction. Thereafter, however, in reversing its prior ruling and substituting the new and now moot requirement for written, signed permission, the Commission by our count used the phrase "express permission" (which does not exist in the law or regulations) nine times in paragraphs 190-93 without a single mention of the word "invitation."

Each of the words used by Congress should be given meaning. It is a black-letter rule of statutory construction, and black-letter law, that "[t]he existence of surplus words should never be presumed." 6 *Sutherland Statutes and Statutory Construction* § 47:37 at 387. Rather, meaning must be given "if possible, to every word in a statute." *Id.* at 392. *See also, American Relay Radio League v. FCC*, 617 F. 2d 875, 879 (D.C. Cir. 1980). Yet by dropping all references to "invitation" in the operative sections of that order, as it does occasionally in this one, the Commission has failed to give independent meaning to that word. It should correct that error by adopting the suggestion herein that the express provision of a fax number to a business in a business context is "express invitation or permission."

There are only two assumptions that must be made to validate this interpretation of the law. First, it must be assumed that a person intentionally giving a fax number to another intends that it be used. Second, it must be assumed that a business will use a fax for business purposes.

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Each of these assumptions is reasonable, and each would implement the intent of the TCPA. as modified by the JFPA.

To be clear, we are not suggesting that once an individual reveals his fax number to a business entity, that fax number becomes fair game to all. Rather, we are suggesting that if, for example, a subscriber to a magazine provides his fax number to the publisher of that magazine on a subscription form, an attendee at a trade show provides his fax number to the owner/operator of that trade show when registering, or when a potential advertiser in a publication or participant in a trade show provides his fax number in a request for information, that person can reasonably be said to be “inviting” the entity to which he provided his fax number to use it for the purpose, perhaps among others, of sending related promotional material to that fax number.

Broadening the Commission’s rules in this way would not only be consistent with the statute on which it is based, it would also go a long way toward removing the impossible burden placed on legitimate businesses—including the members of American Business Media—from complying with the law while conducting their businesses efficiently, effectively and honorably.

Respectfully submitted,



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